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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 32

IRON ROSS, as Receiver of The First National Bank of Perry, Florida, *Petitioner*,

v.

W. V. KNOTT, as Treasurer of the State of Florida, et al., *Respondents.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PETITIONER.

I.

OPINIONS OF THE COURTS BELOW.

The Opinion and Order of the District Court are set out in the Record at pages 33 and 38 and are reported in 13 Fed. Supp. 963.

The Opinion of the Circuit Court of Appeals for the Fifth Circuit is found in the Record at page 53 and is reported in 87 Fed. (2) 817.

II.

JURISDICTION.

This Court has jurisdiction of this case under Judicial Code Sect. 240 (a), as amended by the Act of February 3, 1925, Title 28 U. S. C. A., Sect. 347, having granted on May 24, 1937, writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court in this case. (R. 67) The judgment of the Circuit Court of Appeals to be reviewed was entered January 22, 1937. (R. 57)

III.

STATEMENT OF CASE.

The facts are not in controversy. The Receiver filed suit (R. 1) to set aside and have declared null and void certain pledges of assets made by the First National Bank of Perry, Florida, while a going concern, to secure various deposits of public money belonging to Taylor County, Florida, on the ground that said pledges of assets were made prior to the Enabling Act of June 25, 1930, c. 604, 46 Stat. 809; 12 U. S. C. 90, which Act for the first time authorized national banks to give security for public deposits of a state or political subdivision. Said Statute provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The First National Bank of Perry, Florida, was closed by the Board of Directors on October 18, 1930, (R. 9) and a Receiver was appointed by the Comptroller of the Currency on October 25, 1930 (R. 9).

On March 12, 1930, the bank pledged with and delivered to W. V. Knott (Treasurer of the State of Florida), as County

Treasurer Ex Officio of Taylor County, Florida, $10,000.00 par value County of Sarasota 5½% Highway Bonds as security for funds deposited (R. 5). On March 15, 1930, the bank also pledged with and delivered to said State Treasurer (as ex officio County Treasurer) for a similar purpose $10,000.00 par value Town of Perry Bonds (R. 6).

In 1929 and early in 1930 but not after May 2, 1930, the bank pledged with the Bond Trustees of Taylor County (the designation under which the account was carried prior to being taken over by the State Treasurer, as County Treasurer Ex Officio of Taylor County), securities consisting of mortgages, notes and bonds having a face value of $69,549.76 for the purpose of securing deposits of the Bond Trustees of Taylor County, which were assigned to W. V. Knott, State Treasurer, as Ex Officio County Treasurer of Taylor County on May 2, 1930 (R. 6, 19, 20). All of this last group of securities remained in the physical possession of the bank in trust for the pledgee (R. 19) until after closing (R. 7) when the Receiver delivered to Knott a portion of said collateral consisting of the bonds covered by the assignment of May 2, 1930, having a face value of $20,250.00 (R. 7).

It is conceded and assumed for discussion that under the law of Florida state banks had authority at the time the deposits in question were made with the First National Bank, to pledge their assets to secure deposits of the type and class now under consideration.

> "In Florida it has long been the law that state banks may give security for public deposits. First American Bank and Trust Company v. Town of Palm Beach, 96 Fla. 247".
>
> (Extract from opinion of court below, R. 55.)

Also see *Davis* v. *Knott*, 109 Fla. 60.

No new deposits of Taylor County funds and no additional pledges of assets to secure said deposits were made after the Act of June 25, 1930 became effective. (Opinion trial court, R. 36)

Dividends in the sum of $13,318.03 representing dividends of 19 per cent on the deposits have been paid Knott as Ex Officio County Treasurer (R. 8). From collections made on the pledged collateral remaining in his hands, the Receiver paid Knott as Ex Officio County Treasurer of Taylor County $20,759.31 (R. 8). Knott has collected $2,025.00 in interest from the collateral and $1,042.50 from the sale of a portion of the collateral in his hands (R. 8). Knott is still holding pledged assets having a face value of $39,250.00 (R. 9, 18, 21). The payments by the Receiver to the State Treasurer, as Ex Officio County Treasurer, resulted from a mistake by the Receiver of the applicable law. (R. 12.)

To prevent the threatened sale of the remaining pledged assets and the application of the proceeds toward payment of the claim and to recover the pledged assets or their proceeds, the Receiver filed suit in the District Court on December 9, 1935. Defendants filed motions to dismiss the bill of complaint (R. 22, 24, 26), which were granted by the District Court (R. 38). 13 Fed. Supp. 963. The District Court's Order was affirmed by the Circuit Court of Appeals. 87 Fed. (2) 817 (R. 57).

Both of the lower Courts held in effect that:

(a) The Enabling Act of June 25, 1930 *validated* the previous pledge agreements with respect to money deposited *before* the Enabling Act became effective.

(b) The fact that the moneys *were permitted to remain on deposit* from and after June 25, 1930, until the Bank closed on October 18, 1930 validated the pledges made prior to June 25, 1930.

IV.

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE ARGUED.

(a) The Appellate Court erred in holding that the amendment of June 25, 1930, validated pledges by national banks made before that date as security for deposits of public money of a state or political subdivision made prior to June 25, 1930.

(b) The Appellate Court erred in not holding that the Act of June 25, 1930, could not be given a retroactive or retrospective operation in the absence of such an intention by the Legislature plainly expressed in the law.

(c) The Appellate Court erred in not holding that a contract beyond the power of a corporation to make cannot be made valid by a change in law not in force when the transaction was consummated.

(d) The Appellate Court erred in not holding that the law in force at the time a transaction is consummated determines its validity.

(e) The Appellate Court erred in not requiring the respondents to participate in the pro rata distribution provided by the National Bank Act.

V.

QUESTIONS INVOLVED.

The two principal questions involved are the following:

1. Did the Enabling Act of June 25, 1930, validate the previous pledge agreements with respect to money deposited before the Enabling Act became effective?

The Petitioner contends that the foregoing question should be answered in the negative.

2. Did the fact that the moneys were permitted to remain on deposit from and after June 25, 1930, until the Bank failed on October 18, 1930, validate the pledge agreements that were made prior to June 25, 1930?

The Petitioner contends that the foregoing question should be answered in the negative.

VI.

SUMMARY OF ARGUMENT.

(1) The courts have declined to apply Enabling Acts of the type involved in the instant case to deposits made before the Enabling Act became effective. There appear to be no cases to the contrary other than the decisions of the courts below.

(2) The law in force at the time a transaction is consummated determines its validity.

(3) Provisions of a statute added by amendment take effect only from the time of the amendment and are not considered as having been in force prior to the date of the amendment.

(4) Application of the *Enabling Act* of June 25, 1930, with respect to money deposited before the Enabling Act became effective would involve a retroactive application of the statute.

(5) The contract of a corporation which is ultra vires and beyond the corporate powers conferred upon it by the law-making body is not voidable only but wholly void. The contract cannot be ratified by either party. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it. It is incapable of ratification by estoppel or otherwise. And knowledge of the lack of existence of authority is conclusively presumed.

(6) The State Treasurer, as Ex Officio County Treasurer, occupied the status of an unsecured creditor; payments to him from proceeds of collateral were preferential payments to an unsecured creditor made by the receiver which can be recovered.

VII.

ARGUMENT.

(1.)

Courts have uniformly declined to apply Enabling Acts of the type involved here to deposits made prior to the date the Enabling Acts became effective. There appear to be no cases to the contrary, other than the decisions of the courts below.

On June 25, 1930, Section 5153 of the Revised Statutes was amended, said amendment stating:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State." c. 604, 46 Stat. 809, 12 U. S. C. 90.

It is now established that national banks prior to June 25, 1930, lacked the power to pledge assets as security for deposits of public money belonging to a state or a political subdivision of a state.

This court held in *Marion* v. *Sneeden*, 291 U. S. 262, 268:

> "A national bank could not legally pledge assets to secure funds of a State, or of a political subdivision thereof, prior to the 1930 amendment; and since then it can do so legally only if it is located in a State in which state banks are so authorized. In some States national banks had, prior to the 1930 amendment, frequently pledged assets to secure public deposits of the State or of a political subdivision thereof; comptrollers of the currency knew that this was being done; and they assumed that the banks had the power so to do. But *the assumption* was erroneous. The contention that such power is generally necessary in the business of deposit banking has not been sustained."

See also:

Texas & Pacific v. *Pottorff*, 291 U. S. 245, 258, 259.
Lewis v. *Fidelity & Dep. Co. of Maryland*, 292 U. S. 559, 564, 570, 571.
Thompson, Receiver v. *Twin Falls Highway Dist.*, 17 Fed. Supp. 705, 706.
Webb v. *American Surety Co.*, 88 Fed. (2) 171, 173, 174.
Mays v. *Wilkinson*, 12 Fed. Supp. 350, 354, affirmed as to this point in *Queenan* v. *Mays*, 90 Fed. (2) 525, 532, 533.
Ross, Receiver v. *Lee, as Comptroller, et al.*, 15 Fed. Supp. 972, 973.
Collins v. *School District of Borough of Trafford*, 72 F. (2) 339, 340.
Utter v. *Eckerson*, 78 Fed. (2) 307, 309.
O'Connor v. *Rhodes*, 79 Fed. (2) 146, 149, 150.
Granzow v. *Village of Lyons*, 89 Fed. (2) 83, 85.
Capital Savings & Loan Ass'n v. *Olmypia Nat. Bank*, 80 Fed. (2) 561, 564, 565.
Rusch v. *Baer*, 18 Fed. Supp. 732, 733.
Citations in connection with the annotated case of *Lewis* v. *Fidelity & Dep. Co.*, 92 A. L. R. 803.
Citations in connection with annotated case of *People* v. *Wiersema State Bank*, 101 A. L. R. 515.

This position was again affirmed by this court in the case of *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564, the court finding, however, that although deposits had been made prior to the passage of the Act of June 25, 1930, nevertheless, at the time the bank closed the balance then on hand consisted entirely of new deposits made subsequent to the Act of June 25, 1930, and under the circumstances the lien of the State, attaching under the Georgia statutes, pursuant to the provisions of a continuing bond given as security for its deposits, was held to be effective. This court explicitly refrained from passing upon the status of deposits, and the security for deposits, made prior to the passage of the act and stated:

"We have no occasion to consider whether the Act of June 25, 1930, would have validated the lien also in respect to deposits made before that date."

The exact situation involved in the instant case arose in the case of *Thompson, Receiver* v. *Twin Falls Highway District*, 17 Fed. Supp. 705. In that case, the national bank receiver brought suit to recover the sum of $3,279.09 claimed to have been illegally paid by the former receiver of the bank from the proceeds of sale of pledged bonds which had been deposited with the County Auditor in 1929 to secure deposits of the Highway District in the bank made prior to June 25, 1930. The bank closed in 1931. The deposits were paid in full by the former receiver from the proceeds of the pledged bonds. The court held on page 706:

"It is obvious that the deposits made prior to June 25, 1930, are the only ones concerned here, and as the bank could not then pledge its assets to secure them, the moneys when then deposited became a part of the common fund of the Commercial Department of the bank and were subject to the same risks as moneys of all other persons who made deposits in the bank and no act of the parties thereafter could have been done which would have retroactively converted the common character of the deposits into preferred or secured deposits when the claimed security was prohibited by law, and therefore they are incapable of being ratified."

In *Wood* v. *Imperial Irrigation District*, 216 Cal. 748, 758, there was involved an analogous situation concerning the construction of a state statute which went into effect a few months before the state bank closed but after irrigation district funds had been deposited and secured by a pledge of assets. The new act which had thus been put in effect after the pledge and deposits were made and before closing of the bank, permitted the securing of irrigation district funds; and the question before the court was whether the original pledge contract was validated by the amendment to the depositary statute. The Supreme Court of Califor-

nia held that the original pledge was illegal, that the contract was not validated by the amendment to the depositary act, and that a contract void because it stipulates for doing what the law prohibits, is incapable of being ratified. The court further stated that the recognition of the contract by the parties for a long period after the act becomes legal does not constitute a ratification of the contract. The pertinent portions of the opinion at page 758 thereof follow:

> "We are of the view that the contract or agreement to pledge the bank's assets as security for the deposit made June 19, 1925, was illegal as an original transaction, being in contravention of section 21 of the Bank Act, which declares that 'the capital and assets of such bank are a security to depositors and stockholders, depositors having the priority of security over stockholders.' (See, also, section 27 of the Bank Act.) The only manner in which the priority of one depositor may be secondary to the right of another depositor is by statutory enactment, which does not exist in favor of appellant under the law as it existed when it made its said deposits. The contract was not validated by the adoption of the act of July 29, 1927. At the time said moneys were deposited with the bank they became a part of the common fund of the commercial department of said bank, subject to the same risks as the moneys of all other persons who made deposits in said commercial department. The relationship of debtor and creditor was created. Prior to the security transaction herein appellant had actually made deposits with said bank for which no security was taken. No attempt was made to reaffirm, ratify or bring the transaction within the purview of the act which became a law some two months and twelve days before the bank was taken over by the superintendent of banks, and no act could have been done by the parties to the transaction which would have retroactively converted the common character of said deposits into secured or preferred deposits. The funds had long since been disbursed through the commercial department as other depositors' funds had been disbursed. They were not then in the bank. No deposits were made within the time in which the irriga-

tion district was entitled to receive security for deposits, and only those bodies which made deposits and took security therefor under the express sanction of existing law were entitled to enjoy the extraordinary privilege provided by statute. A contract void because it stipulates for doing what the law prohibits is incapable of being ratified. The recognition of the contract for a long period after the act becomes legal does not constitute a ratification of the contract. (Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 16 Am. St. Rep. 695, 4 L. R. A. 466, 42 N. W. 872; Stevens v. Boyes Hot Springs Co., 113 Cal. App. 479, 298 Pac. 508; Robinson v. Contra Costa etc. Assn., 112 Cal. App. 252, 296 Pac. 922; Biggart v. Lewis, 183 Cal. 660, 671, 192 Pac. 437; Colby v. Title Ins. & Tr. Co., 160 Cal. 632, Ann. Cas. 1913 A, 515, 35 L. R. A. (N. S.) 813, 117 Pac. 913.) Neither does such a contract create an estoppel. (Hedges v. Frink, 174 Cal. 552, 555, 163 Pac. 884; Colby v. Title Ins. & Tr. Co., *supra;* Tate v. Commercial Bldg. Assn., 97 Va. 74, 75 Am. St. Rep. 770, 45 L. R. A. 243, 33 S. E. 382)."

In three recent decisions of the Federal Courts involving the construction of the Act of June 25, 1930, it has been held that the Act did not validate pledges of assets made by national banks *where the bank closed before the Act of June 25, 1930, became effective,* (as distinguished from the situation where the bank remained open after June 25, 1930). *Webb* v. *American Surety Co.,* 88 F. (2) 171, 173, 174; *Ross* v. *Lee,* 15 F. Supp. 972, 973; *Mays* v. *Wilkinson,* 12 F. Supp. 350, 354, affirmed as to this point in *Queenan* v. *Mays,* 90 Fed. (2) 525, 532, 533.

In *Kavanaugh* v. *Fash,* 74 F. (2) 435, 437, it was held that the Enabling Act of June 25, 1930, vitalized a previously made pledge with respect to *money deposited after the Act became effective.* It appeared however that a new pledge of assets had been made to secure the deposits in question after June 25, 1930.

With the exception of the decisions in the instant case and the cases of *Thompson* v. *Twin Falls Highway District,*

supra, and *Wood* v. *Imperial Irrigation District, supra,* there appears to be no decisions by the Federal or State Courts construing the effect of the passage of an Enabling Act,—such as the Act of June 25, 1930,—on the question of the validity of pledges made *before* the Act became effective, to secure deposits *also* made *before* the Act became effective, where the bank continued open *after* the effective date of the Enabling Act.

(2.)

The law in force at the time a transaction is consummated determines its validity.

The pledge contracts in the instant case were made before the passage of the Act of June 25, 1930. No new contracts were entered into subsequent to the passage of the act and no new deposits under the original contracts were made. The pledges were therefore undoubtedly ultra vires and void under the decisions of this court in *Marion* v. *Sneeden, supra; Texas & Pacific Ry. Co.* v. *Pottorff, supra,* and *Lewis* v. *Fidelity & Deposit Co., supra.*

It is the position of the petitioners that the contracts or pledge agreements were void when entered into, and, being void, the subsequent passage of the Enabling Act of June 25, 1930, could not render valid the contracts which were invalid when made. In this connection, this court has held in *Memphis R. R. Co.* v. *Railroad Commissioners,* 112 U. S. 609, 623:

> "It is, of course, the law in force at the time the transaction is consummated and made effectual, that must be looked to as determining its validity and effect."

The Court of Appeals of the State of New York in the case of *People ex rel City of New York* v. *Nixon,* 229 N. Y. 356, 361, in an opinion handed down by Mr. Justice Cardozo held that:

"The obligation of a contract is determined by the law in force when it is made (McCracken v. Hayward, 2 How. (U. S.) 608, 612). There are times when, in the exercise of the police power, an obligation, once attaching, may be modified or destroyed. * * * That problem never arises when the power has been exerted before the contract has been made. Impairment is conceivable as the result of a statute passed thereafter. Impairment is inconceivable when, at the time of the contract, the statute is in force. * * * Statutes then existing are read into the contract. They enter by implication into its terms. They do not change the obligation. They make it what it is."

Similarly, it was stated in the case of *Handy* v. *St. Paul Globe Publishing Co.*, 41 Minn. 188, 193:

"There is no conflict of decisions on the proposition that a contract, void because it stipulates for doing what the law prohibits, *is incapable of being ratified.* That is this case. The contract contemplated the doing what the law then in force prohibited, and for that reason it was void. It is true the law was so changed after the contract was made that, from the time of the change, it became, as plaintiff claims, lawful to do those things provided in the contract which were unlawful at the time it was made, and so that, as he claims, a contract like this, made after the change went into effect, would have been valid. *But that could not affect the validity of the previous contract, which was void from the beginning.* The parties might have made a *new* contract to commence on or after January 1, 1886; but, because of the illegality in it, they could not at any time ratify this contract from the beginning; and, because it is entire and indivisible, they could do nothing amounting to less than the making of a new contract, which could give vitality to it for the time since January 1, 1886. An entire contract must be ratified, if at all, as an entirety." (Italics inserted.)

It was likewise stated in the case of *Steffey* v. *Bridges*, 140 Md. 429, 434:

"The validity of the contract, therefore, must be determined by the postal laws in existence at the time it was made, and not by the subsequent modifications or changes thereof. In 9 Cyc., 576, it is said that if an agreement was illegal by statute or on grounds of public policy when it was made, it is not rendered legal by repeal of the statute or a subsequent change of the public or legislative policy. Schaun v. Brandt, 116 Md. 566; Stewart v. Thayer, 168 Mass. 519; Rich v. Keyser, 54 Pa. St. 86; Baltimore v. Cahill, 126 Md. 604; Smith v. State, 66 Mo. 215; Brager v. Bigham, 127 Md. 159."

For other cases likewise establishing the rule of law that a contract invalid when made is not rendered valid by a law enacted thereafter, see: *International Products Co.* v. *Vails Estate,* 97 Vt. 318, 325; *Schaun* v. *Brandt,* 116 Md. 560, 566; *Stewart* v. *Thayer,* 168 Mass. 519; *Puckett et al.* v. *Alexander,* 102 N. C. 95, 98; *Hughes* v. *Boone,* 102 N. C. 137, 164; *Denning* v. *Yount,* 62 Kans. 217, 220.

(3.)

Provisions of a statute added by amendment take effect only from the time of the amendment and are not considered as having been in force prior to the date of the amendment.

As heretofore pointed out (*supra,* p. 7) the Act of June 25, 1930, amending Section 5153 of the Revised Statutes permitted national banks *for the first time* to give security for deposits of public money belonging to a state or a political subdivision of a state. *Marion* v. *Sneeden, supra; Lewis* v. *Fidelity & Deposit Co., supra.* There is nothing in the amendment indicating that Congress intended that the provisions of the amendment should have a retroactive effect.

In the case of *McDougald* v. *New York Life,* 146 Fed. 674, 678, the Circuit Court of Appeals of the Ninth Circuit, quotes with approval the rule of interpretation of amend-

ments as set forth in Black on Interpretation of Laws (Section 133, pg. 359, 360) as follows:

> "When an amendatory act provides that the original statute shall be amended 'so as to read as follows,' and thereupon repeats some of the clauses or provisions of the amended statute and omits others, and at the same time introduces certain new clauses or sections, there are three points which must be chiefly noticed in regard to its operation and effect. In the first place, as to those portions of the original statute which the amendatory act simply retains, it is not generally to be construed as a new enactment. It does not repeal those provisions and then reenact them in the same terms, but they are to be considered as remaining in force from the time of the original enactment, and as being merely continued in operation by the amendatory statute. * * * In the second place, *those provisions which are newly added by the amendatory statute are not to be considered as having been in force from the beginning. They take effect from the time of the enactment of the amendatory act, and derive their whole efficacy and vitality from the amending law, and not from that amended.* * * * In the third place, all those provisions of the original statute which are not repeated in the amending statute are abrogated or repealed thereby, and are thereafter of no force or effect whatever." (Italics inserted.)

(4.)

Application of the Enabling Act of June 25, 1930, to money deposited before the act became effective would involve a retroactive application of the Enabling Act.

Both of the lower courts seem to have been confused by the following language of this Court as contained in the case of *Lewis* v. *Fidelity & Deposit Company*, 292 U. S. 559, 571:

> "A statute is not retroactive merely because it draws upon antecedent facts for its operation."

The lower courts evidently construed this language to mean that it would not render the Act of June 25, 1930, re-

troactive to apply it to deposits under a pledge agreement notwithstanding both the pledge and the deposits thereunder were made prior to the operative date of the statute.

We think that what *this* court meant in the Lewis case is, that it would not render the Act of June 25, 1930, retroactive to apply it to deposits that *were made after the operative date of the amendment for the unexpired period of a continuing agreement for security which was executed prior to the operative date of the Act.* The antecedent facts to which reference was made by this Court were: the existence of a depository bond, executed for a term of four years by a national bank in July, 1928, which was given pursuant to the provisions of a state statute providing that the bond shall be secured by a general lien on the bank's assets. This court held in effect that as the bond had not expired when the Act of Congress which authorized the same became operative, the application of the Act of June 25, 1930, to deposits made *thereafter* in pursuance of the continuing agreement for security did not render the statute retroactive in effect.

All of the deposits in the case now before the court, however, were made *prior* to June 25, 1930, under pledge agreements which were made prior to June 25, 1930, and to apply the statute to deposits made prior to the operative date of the amendment under pledge agreements which were made prior to the operative date of the amendment, would render the statute retroactive in its application.

In the case of *National Liberty Ins. Co.* v. *Bank of America,* 214 N. Y. Supp. 643, 652, the Supreme Court of New York quotes with approval the rule of statutory construction as to retroactive effect set forth in *Johnston* v. *United States,* 17 Court of Claims, 157 at page 171, as follows:

> "A statute does not operate retrospectively when it is made to apply to future transactions, merely because those transactions have relation to and are founded upon antecedent events."

The rule is stated by the Supreme Court of Michigan in the case of *Clearwater Township* v. *Board of Supervisors*, 187 Mich. 516, 521, as follows:

> "A law is not retrospective in a sense forbidding it because a part of the requisite for its action and application is drawn from a time antedating its passage."

As to the Amendment of June 25, 1930, any construction other than the one for which plaintiff contends, would have the effect of bringing into existence a new obligation, thereby impairing vested rights. *Cox* v. *Hart*, 260 U. S. 427, 435.

The general rule as to retrospective construction is well stated in the case of *Western Pac. R.* v. *Baldwin*, 89 Fed. (2) 269, 273 as follows:

> "The question is certainly not free from doubt, but a general rule of statutory construction followed by the federal courts is 'that a retrospective operation will not be given to a statute which interferes with antecedent rights, or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' United States v. Heth, 3 Cranch. 399, 413, 2 L. Ed. 479, 483; Reynolds v. McArthur, 2 Pet. 417, 7 L. Ed. 470; United States v. American Sugar Refining Co., 202 U. S. 563, 577, 26 S. Ct. 717, 50 L. Ed. 1149, 1152; Winfree, Adm'r. v. Northern Pac. Railway Co., 227 U. S. 296, 33 S. Ct. 273, 57 L. Ed. 518; Union Pac. R. Co. v. Laramie Stock Yards Co., 231 U. S. 190, 199, 34 S. Ct. 101, 102, 58 L. Ed. 179; Gordon v. Empire Gas & Fuel Co. (C. C. A. 5) 63 F. (2d) 487, 489; Jones v. Fidelity & Columbia Trust Co. (C. C. A. 6), 73 F. (2d) 446, 447."

In the *U. S. Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306, 314 it is said:

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a con-

> struction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

In the case of *Harvey* v. *Tyler*, 69 U. S. 328, 347, it was held:

> "And it is a rule of construction, that all statutes are to be considered prospective, unless the language is express to the contrary, or there is a necessary implication to that effect."

(5.)

A contract of a corporation which is ultra vires and beyond the corporate powers conferred upon it by the law-making body is not voidable only but wholly void. The contract cannot be ratified by either party. No performance on either side can give the unlawful contract any validity or be the foundation of any action upon it. It is incapable of ratification by estoppel, or otherwise. And knowledge of the lack of existence of authority is conclusively presumed.

This court, in many decisions, has sustained the proposition that a contract of a corporation which is ultra vires and beyond the powers conferred upon it by the law-making body is not voidable only, but is *wholly* void. Such a contract cannot be ratified by either party. No performance by either party can give the unlawful contract any validity or be the foundation of any right of action upon it. It is incapable of ratification, confirmation or enforcement by the application of any doctrine of estoppel or otherwise and knowledge of the lack of existence of authority is conclusively presumed. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 260; *California National Bank* v. *Kennedy*, 167 U. S. 362, 371; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 553; *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 139 U. S. 24, 59; *Granzow* v. *Village of Lyons*, 89

F. (2) 83, 85; *Awotin* v. *Atlas Exchange National Bank*, 295 U. S. 209, 213.

(6.)

The State Treasurer, as Ex Officio County Treasurer, occupied the status of an unsecured creditor; payments to him from proceeds of collateral were preferential payments to an unsecured creditor made by the Receiver which can be recovered.

The pledge of assets being ultra vires and void, the national bank receiver is entitled to recover the assets or their proceeds on behalf of all creditors of his trust. *Marion* v. *Sneeden*, 291 U. S. 262, 272; *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, 261; *O'Connor* v. *Rhodes*, 79 F. (2) 146, 152; *Webb* v. *American Surety Company*, 88 F. (2) 171, 174; *Granzow* v. *Village of Lyons*, 89 F. (2) 83, 85, 86; *Ross* v. *Lee*, 15 F. Supp. 972, 974; *Mays* v. *Wilkinson*, 12 F. Supp. 350, 355; *Queenan* v. *Mays*, 90 Fed. (2) 525, 532, 533; *Thompson* v. *Twin Falls Highway District*, 17 Fed. Supp. 705, 708; *Faircloth* v. *City of Atlantic City*, 16 F. Supp. 131, 132; *Adams* v. *Cribbis*, 17 F. Supp. 723, 725; *Fidelity & Casualty Co.* v. *Allen*, 84 Fed. (2) 53, 54; *Rusch* v. *Baer*, 18 F. Supp. 732, 734; *Griffin* v. *Royall*, 70 Fed. (2d) 103, 104.

Furthermore, if the pledges were invalid for want of power on the part of the bank to make, the delivery by the Receiver after closing of the bank of a portion of the pledged assets and the payment to the State Treasurer of proceeds derived from the collections made on the pledged assets after suspension of the bank by the Receiver, constituted a transfer of assets after the commission of an act of insolvency, in violation of the provisions contained in Section 5242 of the Revised Statutes (Appendix pg. 21) and such preferential transfers of assets may be recovered by the Receiver of the insolvent national bank. *Mechanics Universal Joint Co.* v. *Culhane*, 299 U. S. 51, 58.

The State Treasurer as Ex Officio County Treasurer of Taylor County is a common or general creditor of the bank;

entitled only to dividends on his claim the same as any other creditor of the insolvent bank, in accordance with the provisions contained in Section 5236 of the Revised Statutes (Appendix Page 22). *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245, 262; *Cook County National Bank* v. *United States*, 107 U. S. 445, 448, 449.

To sustain the pledges would be inconsistent with the provisions of the National Bank Act which are designed to insure in case of disaster uniformity in the treatment of depositors and a ratable distribution of assets. *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 287; *Cook County National Bank* v. *United States*, 107 U. S. 445, 448, 449.

CONCLUSION.

The pledges of assets were made and the deposits for which the assets were pledged as security were also made before the date on which the Enabling Act of June 25, 1930 permitted the securing of such deposits by national banks. It is the contention of the petitioner that the pledges to secure the old deposits, being void for want of power on the part of the bank to make, *could not become effective without giving retroactive construction to the Act of June 25, 1930,* contrary to the intention of Congress as expressed in the Act. No new deposits having been made of County funds with the bank after June 25, 1930, the pledges cannot be upheld as valid. The petitioner asserts that the judgment of the Circuit Court of Appeals recognizing the validity of the pledges here in question should be reversed by this Court.

Respectfully submitted,

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APPENDIX.

Title 12 U. S. C. A., Sec. 90 (R. S. Sec. 5153)

DEPOSITARIES OF PUBLIC MONEYS AND FINANCIAL AGENTS OF GOVERNMENT. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided, That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State. (Act of Mar. 3, 1901, c. 871, 31 Stat. 1448; Mar. 4, 1907, c. 2913, Sec. 3, 34 Stat. 1290; Dec. 23, 1913, c. 6, Sec. 27, 38 Stat. 274; Aug. 4, 1914, c. 225, 38 Stat. 682; June 25, 1930, c. 604, 46 Stat. 809).

Title 12 U. S. C. A., Sec. 91. (R. S. Sec. 5242)

TRANSFERS BY BANK AND OTHER ACTS IN CONTEMPLATION OF INSOLVENCY. All transfers of the notes, bonds, bills of ex-

change, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgment or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Title 12 U. S. C. A., Sec. 194. (R. S. Sec. 5236)

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 32.

IRON ROSS, as Receiver of The First National Bank of Perry, Florida, *Petitioner*,

v.

W. V. KNOTT, as Treasurer of the State of Florida, et al., *Respondents*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF FOR PETITIONER.

J. TURNER BUTLER,
Attorney for Petitioner.

GEORGE P. BARSE,
L. R. STOVER,
Attorneys for the Comptroller of the Currency,
Of Counsel.

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